

JAN 18 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARTURO VILLA-LOPEZ,

Defendant - Appellant.

No. 05-10456

D.C. No. CR-04-02395-CKJ

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona

Cindy K. Jorgenson, District Judge, Presiding

Submitted January 14, 2008^{**}

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Arturo Villa-Lopez appeals from the district court's judgment imposing a 30-month sentence for conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii), and 846, and possession with

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii).

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate and remand for resentencing.

Villa-Lopez contends that the district court erred at sentencing because it concluded that, if it applied the safety valve, then it must impose a sentence within the Guidelines range and deny any downward variance based on the aberrant nature of Villa-Lopez's offense. We conclude that the record indicates that the district court misunderstood its discretion here. Following *United States v. Booker*, 543 U.S. 220 (2005), when a defendant qualifies for the safety valve, the district court is statutorily required to apply the Guidelines in an advisory manner along with the other factors contained in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3553(f); *United States v. Cardenas-Juarez*, 469 F.3d 1331 (9th Cir. 2006).

VACATED and REMANDED for resentencing.